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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, AND PAMELA R. MONZERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRUIT

PETITIONERS' REPLY BRIEF

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Preliminary Statement

Understandably, the Government does not defend the court of appeals as *correct* in refusing to disqualify a district judge whose wife received $30 million in a transaction financed by a party before him. Rather, calling the petition "fact-specific" (Opp. Br. at 15), the Government rewrites the opinion below in an effort to harmonize the Second Circuit's avowedly "purely legalistic" (A14) approach to judicial disqualification with the rigorous demands of section 455(a) and of *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988). In endorsing the Second Circuit's unprecedented "clear and indisputable abuse of discretion" standard for pretrial review of denials of recusal motions, the Government ignores the threat this insurmountable standard poses to public confidence in the integrity of the judiciary, and glosses over an obvious conflict among the circuits on this precise issue.

The Second Circuit's errors extend well beyond the facts of this case. As demonstrated by the heated tone of the Second Circuit's internal debate, principles — not facts — are at stake in this petition. The four Second Circuit judges who took the unusual step of writing a dissent from the court's denial of rehearing *en banc* expressly disagreed with the panel majority's "standards for recusal" (A42), not with its factual findings, which are essentially undisputed. If not corrected, the general principles applied by the court below, in direct conflict with other circuits, will set a mischievous precedent and will undermine Congress's central objective in enacting section 455(a): to promote public confidence in the integrity of the judiciary.

The Second Circuit's distorted perspective on judicial disqualification is especially ironic in this case. As Judge Lumbard noted below, issues of judicial integrity — always of paramount importance — assume even greater significance when the integrity of financial markets is the very subject being adjudicated. (A30). The Government's constant refrain in enforcing the securities laws has been that the same legal principles apply to everyone. This rule applies to courts every bit as much as stock markets. The SEC brings enforcement actions like this one with the announced goal of preserving public confidence in the securities markets and in those who participate in them. That endeavor, whatever its merits in other respects, can only backfire if the

public cannot be confident that the judicial process responsible for policing the markets is itself insulated from all temptations to manipulate, evade, or ignore the rules.

If the federal district judges, when their jurisdiction is invoked by the SEC, are to be the guardians of propriety in the marketplace, then it is incumbent upon the appellate courts to keep an especially close watch on the guardians themselves. Contrary to the implications of the decision below, there is no separate, "purely legalistic" standard for the more privileged or the more financially and legally sophisticated, for whom conflicts of interest or other improprieties obvious to any reasonable observer may be brushed aside as imaginary or inconsequential.

In the public eye, Judge Pollack can hardly appear an appropriate jurist to preside over allegations of wrongdoing in the high-yield bond market — in a case on which the entire nation has focused its attention — when his wife has just received $30 million from a deal financed by such bonds, underwritten and largely purchased by Drexel (one of the parties before him), and when the judge himself has made the extraordinary public statement that his family's fortunes were "adverse[ly]" affected by the very filing of this recusal motion. (A27). This appearance of impropriety is made all the more disturbing, not any less so, by the fact that the SEC has convinced Drexel, whose business dealings benefited the judge's family and whose interests are now at least partly adverse to petitioners', to do an abrupt about-face: in a provision surely unique in the history of governmental consent decrees, Drexel has agreed with the SEC "not to petition the Supreme Court of the United States for a writ of certiorari, or to seek to join further in the motions of others requesting the recusal of the Honorable Milton Pollack in this and all related actions." (Opp. Br. of the *Arden Way* Plaintiffs as Amici Curiae, App. at 3).

Moreover, Judge Pollack's intense personal reaction to the filing of the recusal motion — which the Government altogether ignores — makes this case especially appropriate for plenary review. If Congress's recusal procedures are to be effective, litigants must not be afraid to bring judicial conflicts of interest and other grounds for recusal to light whenever discovered. Nor may judges view litigants who seek recusal as "attacking [them] professionally" (A76) or launch

retaliatory counterattacks on the ethics of attorneys who file such motions. If that conduct is countenanced here, no lawyer contemplating a recusal motion — a step taken only with great circumspection — will be able to justify the risks to his client and his own professional reputation. This systemic impact on the bar as well as the judiciary should be given great weight in assessing the petition in this case.

Most denials of certiorari represent the end of the matter. This case, however, has barely begun. If certiorari is denied, this case will proceed for what is likely to be years under a cloud — a cloud which, as noted by the five dissenting Second Circuit judges, would not be dissipated, if ever, until the final appeal in this litigation. In light of the nationwide attention focused on this case and the intense split among the Second Circuit judges themselves, this Court's failure to grant certiorari would send a loud and lamentable signal to the lower federal courts and to the public at large.

Argument

I. CERTIORARI IS APPROPRIATE TO REVIEW THE SECOND CIRCUIT'S DANGEROUS AND UNPRECEDENTED STANDARDS FOR JUDICIAL DISQUALIFICATION UNDER SECTION 455(a).

The Government attempts to contain the broad implications of the opinion below by creatively rewriting it. To be sure, as noted in our petition, the Second Circuit did pay lip service to the objective recusal standard set forth in section 455(a) and embraced by this Court in *Liljeberg*. But the standard actually applied by the Second Circuit — which is what will guide courts considering future recusal motions — is profoundly at odds with the letter and spirit of the disqualification statute, with the *Liljeberg* decision, and with the decisions of other circuits.

A. Contrary to the Government's assertion (Opp. Br. at 16 & n.16), the court of appeals, as noted by the five dissenting judges, unambiguously adopted a "purely legalistic perspective" in evaluating appearances of judicial partiality under section 455(a). (A14). The Second Circuit's deeply flawed approach is evident not only from its express

rejection of Judge Lumbard's statement in dissent that section 455(a) "requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective" (A14, A28), but also from the majority opinion's prolonged and detailed analysis of the various lines of privity in the Palais Royal transaction and from its reliance on "expert testimony" as to whether Drexel was "indispensable" to the successful financing of the leveraged buyout. (A6, A7).

But why should these matters make the slightest difference? Why would the reasonable observer, evaluating an appearance of judicial partiality, care whether a party literally handed $30 million to a judge's wife, or whether such a payment instead flowed to the judge's wife through other hands, as a direct result of the party's efforts? Why would an objective observer care whether some other investment bank not appearing before the judge might in theory have appeared on the scene to raise the millions paid to the judge's wife? The short answer is that such matters would be wholly irrelevant to the reasonable bystander.

Thus, the Second Circuit's adoption of a "purely legalistic perspective" cannot be seen as a mere slip of the judicial pen: this perspective permeates the court's whole approach, directly conflicts with *Liljeberg* and the decisions of other circuits, and guts the congressional policies animating section 455(a).

B. Moreover, contrary to the Government's intimations, petitioners have never suggested that appearances of partiality are to be measured by "an ill-informed lay person [who] might suspect the worst of a judge." (Opp. Br. at 16). To the contrary, petitioners urge that the legalistic distinctions at the core of the court of appeals' analysis would be demonstrably irrelevant to a reasonable lay observer assessing an appearance of partiality, however well-informed or sophisticated the observer might be. 1/

1/ As this Court made clear in *Liljeberg*, the lay observer contemplated by section 455(a), even if he would not "suspect the worst of a judge," does have "the concerns of the skeptic." 108 S. Ct. at 2205 n.12; *see id.* at 2204–05. But one need not be much of a skeptic to see through the smokescreen of "privity" created by the court below.

In short, disqualification under section 455(a) turns on relevant appearances, not privity. 2/ Judges struggling with recusal motions should not be tempted to gloss over apparent conflicts of interest through the kind of casuistic reasoning that infects the decision below.

C. As an additional ground for certiorari, petitioners demonstrated that the court of appeals improperly relied on extraneous factors hostile to the purposes of section 455(a) — including (1) the district judge's purported investment of time in the case; (2) concededly unsubstantiated charges that a party intentionally manufactured the conflict; and (3) admittedly unsupported allegations of judge-shopping. The Government meekly defends the court's reliance on these irrelevant matters as "fill[ing] in the background that the statutorily required objective observer would take into account in judging recusal." (Opp. Br. at 17). The Government (*id.* at 17–18) asks this Court to credit the court of appeals' transparent rhetorical ploy of discussing these irrelevant but tendentious matters at length, admitting that they are unproved, and claiming that a reasonable person would "want to know" about them anyway — all the while insisting, with an almost perceptible wink, that the court's decision does not "turn on" them. (A20, A18).

But the Government cannot so easily patch up the Second Circuit's defective analysis. Section 455(a)'s reasonable lay observer should, of course, be "fully informed of the facts *underlying the grounds on which recusal was sought.*" *Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988) (emphasis added); *see also Union Carbide Corp.* v. *U.S. Cutting Services*, 782 F.2d 710, 715 (7th Cir. 1986). But no court has ever suggested that the statutorily mandated observer should consider the charges of judge-shopping that inevitably follow the filing of a recusal motion or that the lay observer should weigh whether holding the judge to the statutorily mandated recusal standard would result in a significant waste of previously expended judicial time and

2/ For example, in some cases a judge may not need to recuse himself even though he is in privity with a party, as when a judge is a ratepayer of a utility involved in proceedings before him. *See, e.g., In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980).

effort. Congress has already struck that balance — and did so in favor of an unimpeachable judiciary.

II. THE SECOND CIRCUIT'S INSURMOUNTABLE STANDARD FOR MANDAMUS REVIEW OF RECUSAL MOTIONS MERITS PLENARY REVIEW BY THIS COURT.

A. The Government is understandably apprehensive about subjecting to plenary consideration the Second Circuit's illogical standard of mandamus review for recusal motions. But one cannot seriously credit the Government's suggestions that the standard of mandamus review "made [no] difference to the court of appeals' decision in this case," makes no "difference to the outcome of disqualification cases in general," and is simply too "abstract" to warrant this Court's certiorari review. (Opp. Br. at 20).

First of all, the Second Circuit did *not* apply, as the Government incorrectly contends (Opp. Br. at 20–25), a "clear and indisputable right" standard for mandamus review. Rather, the majority applied a "clear and indisputable abuse of discretion" standard. (A12, A15). That unduly stringent standard *has never before been applied by any federal court* and, not surprisingly, is not mentioned anywhere in the Government's opposition brief. If left uncorrected, the Second Circuit's standard would effectively eliminate pretrial review of a district judge's denial of a recusal motion.

Contrary to the Government's misleading assertion (Opp. Br. at 20), the majority's essentially insurmountable standard of review was dispositive in the Second Circuit's denial of relief. [3/] As the Government grudgingly acknowledges (*id.* at 20 n.20), eight Second Circuit judges confirmed that it was the majority's stringent standard of review that led the court below to deny relief, and expressly said that the result might well have been different if the matter were being considered on direct appeal under an ordinary standard of

3/ The majority opinion expressly declared that "[a]n appellate court's power to issue a writ of mandamus upon a claim of wrongful refusal to recuse is inextricably related to the scope of review over the district court's determination." (A10)

review. (A37, A42). [4/] The standard of mandamus review applied by the majority was anything but irrelevant; it was, in fact, outcome-determinative. [5/]

B. The Government attempts to justify the Second Circuit's standard of mandamus review by invoking the general "congressional policy disfavoring interlocutory appeals" (Opp. Br. at 21) and by embracing the majority's wholly speculative fear that applying a mandamus standard less stringent than "clear and indisputable abuse of discretion" would transform "mandamus applications to review a judge's refusal to recuse [into] an effective tactic for harassment and delay." (A11). These purported justifications wholly ignore the unique institutional values implicated by recusal motions.

First, as *Liljeberg* emphasized, Congress's paramount concern in enacting section 455(a) was "to promote public confidence in the integrity of the judicial process." 108 S. Ct. at 2202. That policy greatly outweighs the interest in avoiding piecemeal litigation asserted by the Government. Indeed, this Court has held that the policy against piecemeal review, while no doubt substantial, must yield in "an extraordinary situation." *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 403 (1976). When the *Liljeberg* Court was confronted with an equally substantial interest -- preserving the finality of judgments (which, too, may be overcome only in "extraordinary circumstances," 108 S. Ct. at 2204) -- it emphatically held that the systemic imperative of maintaining the public's confidence in the judicial process constitutes an "extraordinary circumstance" sufficient to overcome the policy in

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4/ The same reasoning punctures the Government's claim that "it is hardly clear to what extent the special 'clear and indisputable right' standard for mandamus relief actually makes a difference to the outcome of disqualification cases in general." (Opp. Br. at 20).

5/ Nor should this Court credit the Government's fanciful assertion that determining the proper mandamus standard "has an abstract quality that counsels against this Court's review." (Opp. Br. at 20). Standards of review, while perhaps "abstract" to the Government, are of unquestionable importance in securing substantive rights and are frequently dispositive. Each Term, this Court's docket contains numerous cases involving equally "abstract" standard-of-review issues.

favor of preserving the finality of judgments. *Id.* [6]/ That same conclusion in favor of preserving judicial integrity necessarily follows here.

Second, the Second Circuit's speculative fear that a less stringent standard of mandamus review would open the floodgates to a multitude of frivolous recusal motions and mandamus petitions is baseless. [7]/ Given the sensitivity of disqualification issues, lawyers approach the filing of serious recusal motions — much less "spurious" ones (Opp. Br. at 24) — most reluctantly. Those few lawyers contemplating frivolous recusal motions, undeterred by the potential damage to their professional reputations, would find their boldness curbed by the specter of sanctions at the trial or appellate court level. [8]/ Finally, the fact that only two mandamus petitions seeking to reverse a district judge's denial of a recusal motion were filed in the Seventh Circuit in the four years since that court adopted a far less stringent standard of mandamus review completely disposes of the Second Circuit's unfounded concerns. *See In re National Union Fire Ins. Co.*, 839 F.2d 1226 (7th Cir. 1988); *Union Carbide Corp.* v. *U.S. Cutting Services*, 782 F.2d 710 (7th Cir. 1986).

At bottom, the Government rests its argument in support of an artificially stringent mandamus standard on Congress's failure "to create a special category of interlocutory appellate review for recusal cases." (Opp. Br. at 24). But in the absence of an express congressional directive, this Court has long viewed the scope of interlocutory appel-

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6/ The dictum plucked from *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 378 (1981), a pre-*Liljeberg* decision involving appealability under 28 U.S.C. § 1291, cannot bear the weight placed upon it by the Government. (Opp. Br. at 23). Indeed, in *Firestone*, this Court expressly recognized the availability of mandamus relief to review interlocutory orders. *See* 449 U.S. at 378–79 n.13. Moreover, *Firestone* involved the issue of attorney disqualification, not judicial disqualification. Notwithstanding the Government's assurance to the contrary, judicial disqualification motions, which are essential to the public's confidence in the integrity of the judiciary, are strikingly different "from numerous other motions routinely made during and before trial." (Opp. Br. at 23). *Cf. Helstoski* v. *Meanor*, 442 U.S. 500, 506 (1979) (creating an exception to the final judgment rule for an order implicating interests that "are vitally important to our system of government").

7/ In addition, the Second Circuit's fear that a less stringent standard would result in "delay" (A11) is of limited concern: Unless an appellate court grants the mandamus petitioner a stay, district court proceedings would continue unimpeded.

8/ *See, e.g., DeLuca* v. *Long Island Lighting Co.*, 862 F.2d 427 (2d Cir. 1988) (imposing sanctions against an attorney for a frivolous appeal of a denial of a recusal motion).

late review and mandamus relief -- subjects about which Congress has spoken only in the most general terms -- as within the courts' traditional sphere of competence. 9/

C. The Government struggles without success to obscure the direct conflict between the insurmountable standard of mandamus review adopted by the Second Circuit and the far more sensible standard applied by the Fourth, Fifth and Seventh Circuits. According to the Government, the standard for mandamus review in the Seventh Circuit "simply has not been settled," and that Circuit has not adopted a special rule for recusal matters. (Opp. Br. at 25). The Government is wrong. Judge Posner's unambiguous pronouncement in *Union Carbide Corp.* v. *U.S. Cutting Services*, 782 F.2d 710, 712-13 (7th Cir. 1986), never addressed in the Government's brief, speaks for itself:

> A judge's refusal to recuse himself in the face of a substantial challenge . . . should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. . . . [W]here a serious [recusal] question is raised, we shall interpret generously our power to issue the writ [of mandamus], in order that we may lay the question to rest at the earliest possible time.

See also Durhan v. *Neopolitan*, No. 88-2108, slip op. at 12 (7th Cir. April 20, 1989) ("Once a judge whose impartiality toward a particular case may reasonably be questioned presides over that case, the damage to the integrity of the system is done.") (citing *Union Carbide*, *supra*).

The Government similarly errs when it states that the Fourth and Fifth Circuits have not "enunciate[d] any contrary standard for mandamus review." (Opp. Br. at 25). Although those courts did not discuss their standard for mandamus review at length, the inquiry undertaken

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9/ *See, e.g., Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Abney* v. *United States*, 431 U.S. 651 (1977); *United States* v. *Nixon*, 418 U.S. 683 (1974); *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962); *Stack* v. *Boyle*, 342 U.S. 1 (1951); *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949).

by those courts is simply whether the district judge's failure to recuse himself was "erroneous." *See In re Rodgers*, 537 F.2d 1196, 1197 (4th Cir. 1976); *In re Faulkner*, 856 F.2d 716, 720 (5th Cir. 1988).

D. Finally, it is disingenuous for the Government to chide petitioners for "offer[ing] no good reason for departing from the ordinary mandamus standard for judicial disqualification cases." (Opp. Br. at 22). In fact, the petition delineated *five* compelling reasons (Pet. at 17–18), which the Government essentially ignores. All the Government can muster in response is the lame generalization that delaying resolution of a recusal motion is no more harmful *to the parties* than delaying review of any other interlocutory order whose error may ultimately require reversal on appeal. (Opp. Br. at 23). What the Government and the Second Circuit entirely fail to appreciate is that, in contrast to other interlocutory matters, "if a judge proceeds in a case where there is (only) an appearance of impropriety in his doing so, the injury is *to the judicial system as a whole* and *not* to the substantial rights of the parties." *United States* v. *Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985) (emphasis added), *cert. denied*, 475 U.S. 1095 (1986); *see also Union Carbide*, 782 F.2d at 712; *United States* v. *Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985). As emphasized in *Liljeberg*, it is precisely that injury that section 455(a) was enacted to avert, and it is precisely that injury that the Second Circuit's anomalous and unduly stringent mandamus standard virtually guarantees.

Conclusion

In a time of deepening public skepticism toward virtually all other institutions of govenment, it is hard to imagine a more pressing imperative than preserving both the fact and the appearance of judicial integrity. Far from posing "fact-specific" issues that "do[] not call for this Court's review" (Opp. Br. at 15), the decision below directly assaults the principles safeguarding that integrity. That decision could not be left standing by this Court without serious systemic consequences. Therefore, certiorari should be granted.

Dated: May 18, 1989

Respectfully submitted,

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